

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0585 CG

Charity Gaming

Appeal of Indiana Charity Gaming License Denial

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ISSUES

I. Charity Gaming – Continuous Existence

Authority: IC 4-32-6-20(1)(c); IC 6-8.1-5-1; 45 IAC 18-2-1(a)(b)(6)(c); *Portland Summer Festival v. Department of Revenue*, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

The Consortium Foundation, Inc. (hereinafter referred to as Petitioner) protests the Department's determination that it has not been in continual existence for five (5) or more years.

II. Charity Gaming – Leased Facility

Authority: 45 IAC 18-3-2(e); *Indiana Waste Sys. of Ind., Inc. v. Indiana Dep't of State Revenue*, 633 N.E.2d 359, 365 (Ind. Tax Ct. 1994).

The Petitioner protests the Department's denial of its application for an Indiana charity game license based upon the inability to properly lease a facility in which to conduct its gaming activities.

STATEMENT OF FACTS

The Petitioner is an Indiana not-for-profit corporation incorporated under the laws of Indiana on May 12, 1992. The Petitioner's mission is to serve as a partner with scholarship recipients and their family circles in facilitating student efforts to successfully complete high school and college.

A hearing in this matter was held on December 16, 1999. The Department received a transcript of the hearing on January 6, 2000.

I. Charity Gaming – Continuous Existence

DISCUSSION

The taxpayer protests the Department's revocation of the taxpayer's qualification application for an Indiana Charity Gaming License based upon the Department's determination that the taxpayer had not been in continuous existence for at least five (5) years pursuant to IC 4-32-6-20(1)(c).

45 IAC 18-2-1 states:

(a) To obtain a license to operate an allowable event, a qualified organization must submit a written application on a form prescribed by the department.

(b) The application shall include the following information:

* * *

(6) Sufficient facts for the department to determine that the organization is a qualified organization, including, but not limited to, the following:

(C) Proof that the organization has been in existence for five (5) or more years. (Emphasis added).

The taxpayer filed with its CG-1 the following documentation:

Tax Exempt letter from IRS dated April 22, 1997
Bylaws dated February 19, 1994
Parent/Guardian Pledge Form
Student Pledge Form
Amendment to the Bylaws dated November 22, 1994
Certificate of Incorporation dated May 12, 1992
Articles of Incorporation (signed but no date on documents)
Articles of Amendment dated September 29, 1993
Certificate of Existence dated March 18, 1997
Not-for-Profit Tax Registration Certificate issued July of 1994

At hearing the Petitioner submitted the following additional documents:

Independent Auditor's Report dated May 13, 1999 (FYE 1998)
Independent Auditor's Report dated June 8, 1998 (FYE 1997)
Independent Auditor's Report dated November 12, 1997 (FYE 1995 and 1996)
Independent Auditor's Report dated June 9, 1995 (FYE 1993 and 1994)
Independent Auditor's Report dated November 14, 1996 (FYE 1994 and 1995)
Certificate of Incorporation dated May 12, 1992.

Letter from Indiana Department of Revenue to Petitioner dated June 19, 1994 acknowledging receipt of Petitioner's IT-35A (Application to File as a Not-For-Profit Organization).

Form IT-35AR for the year 1992 dated July 25, 1994

Form IT-35AR for the year 1993 dated July 25, 1994

First page of Federal Form 990 for the year 1994 (not dated)

First page of Federal Form 990 for the year 1997 (not dated)

First page of Federal Form 990 for the year 1998 (not dated)

Indiana Code section 4-32-6-20 states that the organization must be "operating". The Department gives this word its ordinary and plain meaning. Operating is defined by Webster's Dictionary as, "adj. of, relating to, or used for or in operations." The word "operate" means, "1: to bring about: EFFECT 2 a : to cause to function : WORK b : to put or keep in operation..." Webster's New Collegiate Dictionary (1979).

According to the Department, the taxpayer had not been continuously operating for a period of five (5) years as is required. Pursuant to IC 4-32-6-20 a qualified organization means a bona fide religious, educational, senior citizen, veterans, or civic organization operating in Indiana that:

(A) operates without profit to the organization's members;

(B) is exempt from:

(i) taxation under Section 501 of the Internal Revenue Code...

and...

has been continuously in existence for at least five (5) years ... (Emphasis added.)

The Department must determine whether or not the organization has been in continuous existence for at least five (5) years. According to page three of the Department's form CG-1, the relevant facts in determining continuous existence could include a combination of the following items:

Indiana Forms IT-35 AR and IT-20NP;

Federal Form 990 and/or 990T if applicable;

minutes of meetings;

bank statements;

dated newspaper articles;

any type of dated state or local licensing permits, such as alcoholic beverage licenses and registration with the Secretary of State's office;

account payables, including copies of dated invoices;

account receivables, including copies of dated invoices;

utility bills;

dated leases;

canceled checks (representing each of the five years);

bylaws that are dated;

dated articles of incorporation;

affidavits or letters of confirmation from the national or parent organization on organization letterhead; and
descriptions and results of fund-raising activities for the last five years.

Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim that the entity does not qualify for a license is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See *Portland Summer Festival v. Department of Revenue*, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

In reviewing the information provided by the Petitioner there is not enough documentation to show that the Petitioner was operating continuously for five (5) years. The documentation submitted with the taxpayer's CG-1 supports Petitioner's claim that the organization was originally incorporated on May 12, 1992. However, Petitioner is unable to provide the Department with state and federal tax returns for any year other than 1994, 1997, and 1998. The forms consisted of copies of the first page and had no date or signature. The Department obviously can not tell from this information whether or not the returns were even filed let alone when.

The Petitioner provided unsubstantiated independent auditor's reports for the years 1993 through 1998, but where are the returns for these years? The letters covering the years 1993 through 1996 all make the following statements:

... The financial statements have been prepared on the accounting basis used by Consortium Foundation, Inc. for federal income tax purposes, ***which is a comprehensive basis of accounting other than generally accepted accounting principles***...We have not audited or reviewed the accompanying financial statements. A statement of cash flows ***has not*** been presented. Generally accepted accounting principles require that such a statement be presented...Management has elected to ***omit substantially all*** of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting....(emphasis added).

First, what method of accounting was used by the Petitioner? Second, generally accepted accounting principles require a cash flow statement. Why did the Petitioner fail to give one to their accountant? Third, according to the Petitioner's auditor, management omitted substantially all disclosures ordinarily included in financial statements. Why did the Petitioner omit these disclosures if they were operating as the Petitioner stated? The Petitioner did not provide any testimony or evidence to answer any of these questions. The financial information that accompanied Petitioner's application, and provided at hearing, is sporadic at best. Therefore, the Department finds that the Petitioner's information submitted with its application is not sufficient to support its protest. Likewise, the information submitted at hearing does not prove that Petitioner was operating for the requisite period as provided by Indiana law.

FINDING

The taxpayer's protest is denied.

II. Charity Gaming – Leased Facility

DISCUSSION

The taxpayer protests the Department's denial of its application for an Indiana charity game license based upon the inability to properly lease a facility in which to conduct its gaming activities. According to the testimony of the Petitioner's witnesses, and the original lease agreement submitted at hearing, it appears that the Petitioner had entered into a sublease arrangement (the sublease entered into by Petitioner was not with the owner of the real property). The Department's denial was based upon its interpretation of 45 IAC 18-3-2(e). Regulation 45 IAC 18-3-2(e) states in pertinent part, "... A facility is leased when an organization enters into a written agreement to occupy the facility which gives rise to the relationship of lessor and lessee, regardless of the terms of the lease. The lease of a facility for an allowable event must be in writing."

When interpreting legislation a statute is to be given its plain, ordinary, and usual meaning. *See Indiana Waste Sys. of Ind., Inc. v. Indiana Dep't of State Revenue*, 633 N.E.2d 359, 365 (Ind. Tax Ct. 1994). The term *lease* is defined as an agreement which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal). Conveyance, usually in consideration of rent or other recompense, for life, years, or at will, but always for a less time than lessor has in the premises. Black's Law Dictionary 461 (15th ed. 1983). A *sublease* on the other hand is defined as an agreement executed by the lessee to a third person, conveying the same estate for a shorter term than that for which the lessee holds it. Black's Law Dictionary 743 (15th ed. 1983).

The lease entered into by the Petitioner and provided with its charity gaming application was a sublease. The regulation does not specifically state that the facility cannot be subleased. The only requirements found in the regulation are that there must be a lessor lessee relationship and the agreement must be in writing.

At hearing, the Department also stated that the lease entered into was contingent upon a sub-lessee obtaining a bingo license. (See Department's Exhibit C) Also, the sublease entered into by the Petitioner was for an amount significantly less than the amount paid in the original lease (See Department's Exhibit B). However, no matter how compelling these arguments may be, these reasons for denial were not delineated in the Department's denial letter dated October 22, 1999 (Department's Exhibit A) and therefore cannot be heard.

FINDING

The taxpayer's protest is sustained.